United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1683.

JOHN D. BARSTOW, AN INFANT, ETC.,
APPELLANT,

vs.

THE CAPITAL TRACTION COMPANY, A CORPORATION.

ADDITIONAL BRIEF FOR APPELLEE.

It was earnestly insisted by counsel for the appellant upon the argument of this case, that the question of an infant's contributory negligence was determined in this jurisdiction adversely to the claims of the appellee by the following cases:

Railroad Company *vs.* Gladmon, 15 Wall., 401.

Railroad Company *vs.* Stout, 17 Wall., 657.

Union Pacific Railway Co. *vs.* McDonald, 152 U. S., 262.

Baltimore and Potomac Railroad Company *vs.* Cumberland, 176 U. S., 232. (S. C.), 12 App. D.C., 598.

McDermott *vs.* Severe, 202 U. S., 600. (S. C.), 25 App. D. C., 276.

The Baltimore and Potomac Railroad Company *vs.* Webster, 6 App. D. C., 182.

Adams *vs.* Washington and Georgetown Railroad Company, 9 App. D. C., 26.

Before discussing these cases, it will be well to consider what the Supreme Court of the United States has determined as to the effect of their decisions as *res judicatæ*. That court found occasion at a very early point in its history to declare in the most emphatic terms that it was not to be bound by any general language used in its opinions not essential to the decision of the point actually before the court. The language of Chief Justice Marshall in this respect is very pointed and strong.

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of Marbury *vs.* Madison. It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of Marbury *vs.* Madison, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which, no doubt, respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that

the reasoning of the court is directed. They say that, if such had been the intention of the article, 'it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested.' The court says that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that 'affirmative words are often, in their operation, negative of other objects than those which are affirmed; and in this case (in the case of Marbury *vs.* Madison) a negative or exclusive sense must be given to them, or they have no operation at all.' 'It can not be presumed,' adds the court, 'that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.' The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction must imply a negative of any other sort of jurisdiction, because, otherwise, the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If, in that case, original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but, in some instances, contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because, otherwise, the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is to apply the conclusion to which the court was conducted by that reasoning, in the particular case, to one in which the words have their full operation, when understood affirmatively, and in which the negative or exclusive sense, is to be so used as to defeat some of the great objects of the article. To

this construction the court can not give assent. The general expressions in the case of Marbury *vs.* Madison must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning."

Cohens *vs.* Virginia, 6 Wheaton, 399–402.

See, also, United States *vs.* Moore, 3 Cranch., 172.

Ex parte Christy, 3 Howard, 322.

Wisconsin, &c., R. R. Co. *vs.* Price Co., 133 U. S., 509.

Hans *vs.* Louisiana, 134 U. S., 20.

Cross *vs.* Burke, 146 U. S., 87.

Pollock *vs.* Farmers', &c., Loan Co., 157 U. S., 574.

Guided and restrained by these principles of interpretation let us proceed to a consideration of these cases in chronological order.

I.

The case of the Railroad Company *vs.* Gladmon, 15 Wallace, 401, arose in this District. It was tried in the Supreme Court of the District of Columbia before the publication of MacArthur's reports, and hence there is no printed report of the case other than is found in 15th Wallace. The defendant in error, Oliver Gladmon, a child 7 years old in April, 1868, was injured by a car of the Washington and Georgetown Railroad Company. The following statement of fact occurs at page 401 of the report:

"One of the drivers of the Washington and Georgetown Railway Company—a company chartered by Congress to run cars through streets of the cities of Washington and Georgetown—was, on a morning of April, 1868, driving a car

through a populous portion of the latter place. Some person was standing beside him on the front platform of the car. Instead of looking at his horses and before him, he turned his face round and began to talk to this person; thus turning himself so as to look at a right angle to the course in which he was driving. Just as he turned his head, Oliver Gladmon, a child 7 years old, attempted to run across the track, in front of the horses. Before he got across he turned to come back again. In some way which was not more particularly explained, before he got back he was severely injured by the horses or car. Hereupon his father, as next friend of the child, sued the company. The record showed no testimony but that of one witness, who mentioned the chief facts above stated, and testified 'that if the driver had not been looking at his companion he could have checked the horses in time to have prevented the accident.'"

Mr. Justice Hunt, delivering the unanimous opinion of the court, said (p. 406):

> "Sufficient proof was given to establish the negligence of the driver of the car, and no point is raised on that branch of the case."

The court then proceeds to determine that the plaintiff in a damage case is not bound to prove affirmatively that he was himself free from negligence, and that this theory is generally accepted as the true one. That such is the law in this jurisdiction has not been questioned since the Gladmon case.

Having determined that the prayer on this point was erroneous as a general statement of the law, the court had determined all that was necessary for the decision of the case; and hence whatever else was said in this connection was plainly *obiter*.

Proceeding, however, to consider the further opinion

of the court on this point, we find that Mr. Justice Hunt used the following lauguage (p. 408):

> "There is, however, another and very satisfactory reason for the refusal to comply with the prayer. The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and can not be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 3 years of age less caution would be required than of one of 7, and of a child of 7 less than of one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.
>
> "The rule laid down in the request under consideration entirely ignores this difference. Assuming that it would have been a sound rule if the plaintiff had been an adult, it is evident that the jury would not have been justified in applying it in this case. That 'due care and caution' required of plaintiffs generally was not required of the plaintiff here. If it had been given as requested the instruction would have been quite certain to mislead the jury to the prejudice of the plaintiff. It was properly refused."

So far the court has only used language determining that the same degree of prudence is not required from a child as from an adult, and that the degree of care required from a child "is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

The court has nowhere said, up to this point, that the

circumstances of the particular case may not present such proof of negligence on the part of the particular child as to constitute negligence in law, and to disentitle the child to recover.

Proceeding to another point, the court say (p. 408):

> "The instruction asked for in the second prayer, and which the judge refused to give, was as follows:
>
> "'2. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidentally slipped and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable accident, for the consequences of which the defendant is not responsible.'
>
> "The suggestions already made are applicable to this request. The circumstance that the plaintiff was an infant of tender years, and that a different rule was required in that case from the rule in the case of an adult, was excluded from the proposition. A charge in accordance with the prayer could not, therefore, have been properly made. The prayer also assumed as existing, facts of which no proof is found in the record. I do not find any evidence of the fact here assumed, that when the plaintiff slipped or fell, it was too late to stop the car. The evidence on that subject comes from the witness who testified in substance that if the driver had been attending to his duty he could have checked his horses in time. This witness gave the only evidence on the point. It is not allowable to assume as existing, facts not proved, and to ask a direction to the jury upon such assumption. This practice would tend to embarrass and mislead the jury."

This is the whole substance of the opinion in the Gladmon case. As has been seen, the general propositions decided in it were not necessary for the decision of

the case, since the prayers of the plaintiff in error which were rejected by the trial court were thoroughly vicious on other grounds. These general propositions, however, may be accepted as sound law. The only thing that they really determine is something which is not now disputed, to wit: That the care required of an infant is proportioned to the maturity and capacity of the particular infant whose acts are called in question.

II.

The next case in order of time is that of the Railroad Company *vs.* Stout, reported in 17th Wallace, p. 657. In that case the defendant in error, Henry Stout, a child 6 years of age, was injured upon a turntable belonging to the Sioux City and Pacific Railroad Company, plaintiff in error (657). The turntable was in an open space, about eighty rods from the company's depot, in a hamlet or settlement of one hundred to one hundred and fifty persons. Near the turntable was a traveled road passing through the depot grounds, and another traveled road near by. On the railroad ground, which was not inclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one 9 and the other 10 years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis.

Two of the boys began to turn it, and in attempting to get upon it, the foot of the child (he being at the time upon the railroad track) was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

Mr. Justice Hunt (who had delivered the opinion of the court in the Gladmon case), speaking for the court, said (p. 660):

> "It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."

Thus far the decision is a mere reiteration of that in the Gladmon case. It simply says in plain English that what would be fault in an adult is not necessarily fault in a child; and, therefore, such conduct on the part of an adult as would be a fault in him is not necessarily a fault in a child. It may be, and it may be so as a matter of law; but it is not necessarily so. Whether it be a fault or not must depend in each case on the maturity and capacity of the child in question, when considered in the light of the circumstances in the particular case.

The foregoing language, however, was entirely *obiter*, because, as Mr. Justice Hunt proceeds to say (p. 660):

> "The record expressly states that 'the counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his

> tender age) was negligent, but rest their defense on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself.'"

Mr. Justice Hunt next proceeds (p. 661) to consider the question whether or not there was negligence on the part of the railway company in the management or condition of its turntable. The charge below on this point was as follows (p. 659):

> "That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

Mr. Justice Hunt says, referring to this portion of the charge (p. 661):

> "The charge on this point was an impartial and intelligent one. Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was

not entitled to this order, and the judgment can not be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the roadbed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents.

"So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employes of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

"As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table

weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it."

It is thus seen that the Stout case was decided upon the theory that the turntable was a dangerous machine, and that it was not in proper order. In such case, of course, there is evidence of negligence to be submitted to the jury.

The third point decided in the Stout case is a reaffirmation of the well-known rule that where facts are disputed or undisputed, if different minds may honestly draw different conclusions from them the case is properly left to the jury. What this general language means is evident from the decision of the House of Lords in the case of the directors of the Metropolitan Railroad Company and Jackson, quoted in full in the main brief—a case in which the House of Lords differed, in their view as to whether or not negligence could properly be in-

ferred from certain facts, with the jury below, the trial court below (composed of three judges), and with two judges of the Court of Appeals.

Mr. Justice Hunt makes some very wise observations, beginning at page 663, which we quote in full, and in which we thoroughly acquiesce:

> "3d. It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts.

Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

"In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us; that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

"In Redfield on the Law of Railways, it is said: 'And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.'

"In Patterson *vs.* Wallace, there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the House of Lords to be

a pure question of fact for the jury, and the judgment was reversed.

"In Mangam *vs.* Brooklyn Railroad, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a nonsuit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the nonsuit.

"In Detroit and W. R. R. Co. *vs.* Van Steinberg the cases are largely examined, and the rule laid down that when the facts are disputed, or when they are not disputed but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination.

"It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of the opinion that it was properly left to the jury to determine that point."

III.

The case of Union Pacific Railway Co. *vs.* McDonald (152 U. S., 262), was one in which the plaintiff, in the month of September, 1884, who was then a lad about twelve years of age (p. 265), visited the town of Erie, in the State of Colorado, with his mother. The Union Pacific Railway Company at that time operated a coal mine near this village of Erie, and within a few hundred feet of its depot in that village. It was in the habit of depositing the slack from the mine on an open lot between the mine and the station in such quantities that the slack took fire, and was in a permanent state of combustion. This fact had been well known for a long time to the employees and servants of the company, but no fence was

erected about the open lot, and no efforts were made to warn people of the danger.

The plaintiff and his mother arrived by train at the station, and descended there. Neither had any knowledge of the condition of the slack, which on its surface presented no sign of danger. Something having alarmed the boy, he ran towards the slack, fell on and into it, and was badly burned.

The Supreme Court determined three points:

First. That the company was guilty of negligence, in view of the statutory obligation to fence.

Second. That the lad was not a trespasser under the circumstances, and had not been guilty of contributory negligence.

Third. That the case was within the rule that the court may withrdaw a case from the jury altogether and direct a verdict when the evidence is undisputed, or is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it.

Mr. Justice Harlan, in delivering the opinion of the court, considered at great length the first point, and determined (p. 279):

> "'It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so, because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion.' (This is quoted from Cockburn, L. C. J., in Clark *vs.* Chambers, 3 Q. B. D., 327, 338, 1878).
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> "We adhere to the principles announced in Railroad Co. *vs.* Stout, *supra.* Applied to the case now

> before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty or for whose protection it was under no obligation to make provision."

The learned justice then proceeds to cite other cases, all of which are cases of dangerous machines, dangerous traps, and so forth.

Mr. Justice Harlan then preceeds (p. 281) to determine that there was no force in the suggestion that the plaintiff was negligent in falling into the burning slack. He bases this upon a consideration of the testimony showing that persons came out of the coal pit with lamps upon their heads, yelling to the boy plaintiff, "Let's grease him?" "Let's burn him?" and so frightened the lad, and caused him to run in the direction of the town, along

the only path that was open to him, in order to escape those who threatened to harm him. His falling into the slack-heap was accidental, and in no proper or just sense the result of negligence. The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which at the time of the injury the circumstances placed him.

It is thus seen that Mr. Justice Harlan held that the conduct of the boy in running along the path was not negligence, because his flight had been caused by threats made against him; and he did what was a natural thing to do in order to escape those threats. He ran along the only path which was open to him, and it did not lie in the mouth of the coal company which had prepared this trap right alongside of the path to say that the boy should not have fallen into it.

How can anything said by Mr. Justice Harlan in this opinion have any relevancy in considering the conduct of young Barstow in the case at bar? Here was a freight car, well known to him, proceeding along a railroad track well known to him, and here was his deliberate approach to that car while in motion, he, according to his own undisputed statement, knowing well the danger of running against a car in motion, or attempting to hang on to it while in motion. Until a car can be judicially likened to a spring-gun, or a turntable, or a concealed fire-pit, there can be no instruction or aid gathered from the opinion in the McDonald case applicable to the case at bar.

Upon this point counsel refer to Point XI (pp. 229–232) of their main brief and to the cases there cited.

At page 282 Mr. Justice Harlan recognizes the rule that where the facts are undisputed, negligence becomes a question of law. He says:

> "At the close of the charge by the court there was a general exception to the withdrawal from

the jury of the questions of the defendant's negligence and the plaintiff's contributory negligence.

"The court correctly said that there was no controversy about the leading facts of the case, and that the defendant was guilty of negligence. As the facts were undisputed, the question of liability upon the ground of negligence was one of law, and as the facts showed negligence by the railroad company, which was the primary, substantial cause of the injury complained of, it was not error in the court to so declare."

Finally, at page 283, the learned justice says as follows:

"The non-performance by the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty."

IV.

In the case of the Baltimore & Potomac Railroad Co. *vs.* Cumberland, reported in 176 U. S., p. 232, the defendant in error was, at the time of the accident, a lad of 12 years and 4 months of age, and was a street-lamp lighter, engaged under his father's direction in lighting street lamps in the vicinity of the tracks of the plaintiff in error on Maryland avenue in the city of Washington. The accident occurred about dark on the evening of December 10, 1894 (p. 233). The weather was misty, according to some of the witnesses; rainy, foggy, and very cold, according to others. The plaintiff, having lighted a lamp on the south side of Maryland avenue, between Thirteenth-and-a-half and Fourteenth streets, started across Maryland avenue and the tracks of the company, for the purpose of lighting a lamp directly opposite on the north

side of the street. The defense rested chiefly upon the contributory negligence of the plaintiff in crossing the track at this point without sufficient care in looking out for the approach of trains. The trial resulted in a verdict for the plaintiff in the sum of $8,000, upon which judgment was entered. The case was carried by the defendant to the Court of Appeals, and the judgment of the Supreme Court of the District of Columbia affirmed (12th D. C. Appeals, p. 598); whereupon the defendant below sued out a writ of error to the Supreme Court of the United States.

It appears from the opinion of Mr. Justice Brown (p. 235) that there was sufficient evidence to go to the jury with respect to the negligence of the railroad company in any one of four particulars.

First, in failing to protect the tracks by a fence at the point where the accident occurred;

Second, in failing to provide a proper light to give warning of the approach of the train;

Third, the distance passed over by the train after it struck the plaintiff and before it was brought to a stop, as bearing upon the question of speed;

Fourth, whether the persons in charge of the engine were keeping a proper lookout.

Mr. Justice Brown then proceeds to consider each one of these points, and determines that it was proper to leave each one of them to the jury, inasmuch as there was competent testimony with respect to each.

The learned justice next takes up the important question as to whether or not the particular boy was guilty of contributory negligence, as a matter of law, in crossing the tracks without proper precautions. He says (p. 239):

> "Had the plaintiff in this case been a man of mature age and average intelligence, it would be difficult to escape the conclusion that he was guilty of negligence in crossing this track without

taking more careful observations of incoming and outgoing trains. But he was not. He was a boy of 12 years, apparently dull for his age, as he had attended school four or five years without having learned to read or write. There was testimony tending to show that he had only the capacity of a child of 6 or 7. Certain answers given by him upon his examination indicated that his powers of observation were limited or his memory defective. He was employed by his father, who was a city lamplighter, to light about thirty lamps upon or near Maryland avenue; had started shortly before 5 o'clock on the evening in question, which was dark and misty, to make his accustomed rounds, and had just lighted a lamp on the south side of the avenue, when he started across to light a lamp on the north side, almost immediately opposite the one he had just lighted. He says he looked both ways, up and down Maryland avenue for trains, waited for the passing of an outgoing passenger train, but failed to notice an incoming train which was being drawn by a locomotive running backward. The light on the tender was obviously not powerful enough to illuminate the tracks in front of the locomotive, since the engineer and fireman, who were looking at him as he stepped on the track in front of the locomotive, could not tell whether he was a man, woman, boy, or girl, and could not see the ladder he carried. It is probable that he was somewhat confused by the noise of the outgoing train, by the ringing of the engine bell, and by a number of vehicles which had just come over the bridge from the Virginia side, and were rumbling and rattling over the cobblestone pavement. It may be that these noises prevented his hearing the shouting of the engineer and fireman, and of two men at a switch lower down the track toward the bridge, who were calling to him to keep away. It is by no means improbable that, if there had been a strong reflecting light on the tender, as the regulations required, it would have compelled his attention, when an ordinary signal lantern might easily pass unnoticed. Indeed, a

witness who was standing on the corner of Thirteenth-and-a-half street and Maryland avenue, and saw the plaintiff going from the lamp toward the railroad track, saw no train coming up from the bridge, although he was looking in that direction.

"We do not think that under these circumstances plaintiff could be considered a trespasser in crossing the tracks. This term is doubtless applicable to those who unnecessarily loiter upon or walk along a railway track as a convenient path. But to say that the plaintiff, who was lighting lamps on both sides of Maryland avenue, was bound every time he crossed the track to do so at a street crossing, is to apply too stringent a rule. The lamp which he had lighted and the one which he had started to light were upon opposite sides of the street, at a distance of from one hundred to one hundred and fifty feet from the crossing of Thirteenth-and-a-half street. The rule contended for would require the plaintiff, after having lighted the lamp on the south side, to return to Thirteenth-and-a-half street, cross the avenue at that point, and then go about half a block to a point opposite the other, nearly double the distance required to cross the tracks directly. This method would have to be repeated every time he had occasion to cross the avenue. Of course, if a fence had been built this would have been necessary, but in the absence of such fence we do not think that the mere crossing of the track in the convenient performance of his duties made him a trespasser *per se*. We have examined the many cases cited by the plaintiff in error upon this point, and find that nearly all of them either turned upon the question whether loitering upon, playing upon or walking along a railroad track made a person a trespasser, or, whether in crossing a track, sufficient care was used to avoid approaching trains. We are not prepared to give our adherence to the doctrine announced in a very few cases, that a man who steps his foot upon a railroad track, except at a crossing, does so at his peril, though such doctrine when applied to

the facts of the particular case may not have been an unjust one. We are rather disposed to say that, where tracks are laid through the streets of a city, upon or substantially upon the level of the street, a person is not limited in crossing such tracks to the regular street crossings, but may cross them at any point between such streets in the convenient performance of his daily duties. We can not say that there was such danger to an active boy crossing the track at this point as to authorize the case to be taken from the jury upon the ground that he was *ipso facto* a trespasser.

"We have no desire to limit or qualify anything said by us in Railroad Company *vs.* Houston, 95 U. S., 697, or in Northern Pacific Railroad *vs.* Freeman, 174 U. S., 379, both of which involved the question of care at a regular highway crossing, and we have no doubt that in the case under consideration such care should have been used as the nature of the case required, and the intellectual capacity of the plaintiff admitted. But these were all questions for the jury, and were conclusively answered by the verdict. We can not say that the court should have taken the case from the jury, or that it erred in any material particular. We can not even say that we should have come to a different conclusion upon the facts."

It is obvious that under the circumstances of the Cumberland case, the question of contributory negligence on the part of the boy was for the jury. The testimony as to the boy's maturity and capacity required that the jury should find what that maturity and capacity were. In the case at bar there is no such question, as the child's own evidence, as well as other testimony, is conclusive upon that point.

In addition to that, the special circumstances of that case—the failure to fence, the absence of a proper light, the speed of the train, and the failure to keep a proper lookout—were all questions that necessarily took the case to the jury.

On this point we call attention to the concluding paragraph of Mr. Justice Brown's opinion, quoted above, in which he says:

> "We have no doubt that in the case under consideration such care should have been used (by the plaintiff) as the nature of the case required, and the intellectual capacity of the plaintiff admitted."

V.

The case of McDermott *vs.* Severe (202 U. S., 600), was one in which a plaintiff 6 years and 10 months old at the time of the accident was injured by a trolley-car outside of the District of Columbia, but near to the boundary thereof. At the place of the accident there was a plank crossing, the planks laid between and on either side of the rails at a point where a street was opened to the westward, and on the other side of the track a footpath, but no thoroughfare for vehicles. The crossing was one of the regular stopping places of the cars of the street railway near Riverdale, Md. The plaintiff's younger brother, Raymond, who was with him on the occasion in question, was a little over five years of age; and with them was another brother, Edward, about nine years old. The injured boy, at the time he was hurt, had his foot caught in a space between the rail and the edge of the plank on the inside. The testimony disclosed that the boys had expected to meet their parents, returning from a visit, about 2 o'clock in the afternoon of August 31, 1902, and that they went to the railroad crossing for that purpose. Edward, the oldest boy, went to his father's house near by to get a drink of water; while he was gone the youngest boy, Raymond, got his foot caught in the space between the west rail and the plank next the inside of the rail. Plaintiff came to the assistance of his little brother, whose foot he helped to extricate, and was himself

caught in the space between the plank and the rail. Raymond ran to the house to notify Edward that the plaintiff's foot was caught. Together the two boys ran back towards the crossing, and shortly thereafter the plaintiff was struck and so severely injured that it became necessary to amputate his leg below the knee.

It was urged that the court ought to have taken the case from the jury because of the insufficiency of the evidence to sustain a verdict. Upon this point Mr. Justice Day, delivering the opinion of the Supreme Court of the United States said (p. 604):

> "We think the testimony was ample to carry the case to the jury upon the question of the negligent conduct of the motorman at the time of the injury, and that this issue was properly left to the jury under instructions which afford no ground for reversal."

Mr. Justice Day then proceeds to call attention to the fact that the testimony tended to show that there was nothing to prevent the motorman from seeing the crossing for a distance more than sufficient to have avoided the injury by controlling or stopping his car; that the boy Edward waved his hat and "hollered" for the motorman to stop, when the car was fifty or sixty feet away. A passenger who was on the car testified that his attention being called by the motorman ringing his bell, he saw a larger boy than the one on the track waving his hand. Another passenger testified that when from sixty to one hundred yards from the place he saw three boys apparently standing on the platform or crossing; and plaintiff says that just before he was hurt he saw his brother waving his hat and "hollering" to the motorman, and that he, too, waved his hand at the motorman.

Resuming upon this point, Mr. Justice Day says (p. 608):

> "We think the court did not err in its charge in this respect and that the motorman had no right to assume that boys of tender age, such as

the plaintiff, might not be caught upon the crossing, notwithstanding his signals, which would have been adequate to warn one of mature years of approaching danger. Plaintiff was not a wrongdoer. He had gone upon the track with a view of rescuing his brother, and was himself caught and was unable to extricate his foot from the space between the rail and the plank. *It is not contended that he was guilty of any contributory negligence.* He was a child of tender years; the testimony is undisputed that children were in the habit of playing at and near this crossing; that they were at the time of the injury in full view of the motorman at least four hundred feet away, at which distance he admits he saw the boys. It was apparent that one of the boys was right upon the track. The jury may have found from the testimony, and the court could not have disturbed that conclusion, that the motorman acted upon the assumption that the boys would get off the track, and though running at a speed of eight to ten miles per hour, made no effort to get his car under control or to stop it, until he saw the boy's foot was caught, when it was too late to do otherwise than run over him. The car, running with electric power, could have been controlled and taken well in hand so as to be readily stopped at the crossing.

"This court, in Union Pacific Railroad Co. *vs.* McDonald, 152 U. S., 262, 277, quoted approvingly from Judge Cooley in a Michigan case: 'Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly.' This view is supported by other well-considered cases. Powers *vs.* Harlow, 53 Michigan, 507, 514; Camden Interstate Railway Co. *vs.* Broom, 139 Fed. Rep., 595; Forestal *vs.* Milwaukee Electric Railway Co., 119 Wisconsin, 495; Strutzel *vs.* St. Paul City Railway Co., 47 Minnesota, 543; Gray *vs.* St. Paul City Railway Co., 87 Minnesota, 280.

"This is not a case of a sudden and unexpected coming of children upon a track. The jury may have found that if the motorman had acted prudently in view of the signals and warnings to stop, which the testimony tends to show were given, and the full view he had of the boys at the time of the accident, checked the car and kept it under control, the injury might have been avoided.

"We think, upon principle and authority, the court properly left to the jury to find whether the motorman exercised that reasonable care to avoid injury to the boy which the circumstances of the occasion required. And to have given an instruction as requested by the plaintiff in error, which limited the duty of the motorman to sounding an alarm in time for the boy to get off the track, and to act upon the presumption that he would do so until he found it was impossible for the plaintiff to remove his foot, would have been an unwarranted charge."

It is sufficient to say, with respect to the facts of this case, that where a motorman sees a young child ahead of him, directly upon the track, making motions and "hollering" to him to attract his attention and to stop, and when there is another and a larger child standing beside the track and making the same motions and uttering the same shouts, a question is presented to the jury to determine whether or not, under such circumstances, the motorman should not assume that there was something wrong in the situation of the children, and at once stop his car.

It is submitted that the Severe case can be of no assistance to us in the case at bar, because the situations are entirely different. If the mere presence of a 9-year-old boy upon a country road along which a trolley road runs calls upon the motorman for any special action,

then the Severe case has some application. The incorrectness of this assertion has been so repeatedly insisted upon, and supported by authorities, in the main brief, that it is useless to reiterate it here.

VI.

Of the cases decided in the Court of Appeals of the District of Columbia, the first relied upon by counsel for the appellant is that of the Baltimore and Potomac Railroad Company against Webster, reported in 6th Appeals D. C., page 182. This was a case in which the plaintiff, Joseph W. Webster, who was a boy less than twelve years of age at the time of the accident, was injured in December, 1884, by having his foot cut off by a railroad train of the appellant. According to the plaintiff's own testimony, and he was the principal witness that testified in support of his claim, he started about half past 5 o'clock p. m., on the 11th day of December, 1884, for his home from the south side of Maryland avenue, in the city of Washington, in a run northward, along Ninth street towards Maryland avenue; when approaching the railroad tracks he saw the smoke of a train coming from the direction of the Long Bridge, but thought he could get across the tracks; that a number of freight cars were standing on the track, extending eastwardly from Ninth street towards Eighth; that he turned to the right and ran through an opening between the cars; that he was looking at the train coming from the Long Bridge and did not observe any other train. But as he got on the other side of the car, he saw the passenger train coming from the depot "right on" him; that he could not have turned back then, because the freight train was almost on him; that he could not, before passing through the opening between the standing cars, see the train coming from the east, because of the cars obstructing his view; that the

next thing he remembered was both engines passing; that he could not see which train ran over his foot; that after the accident he was taken home by persons who came to his assistance.

At the close of the evidence the defendant asked an instruction from the court that the verdict of the jury should be rendered for it. Upon this point Mr. Chief Justice Alvey, delivering the opinion of the court, said (p. 197):

> "That request was refused, and we think rightly so. There is no denial of the fact that there were freight cars standing on the tracks between Ninth and Eighth streets; and if they were, as contended by the plaintiff, left standing there unnecessarily and improperly, and such standing cars did prevent a view of the moving train that inflicted the injury upon the plaintiff, and such injury would not have occurred but for such obstructed view of the moving train, then, clearly, it was right and proper that those questions should have been submitted to the jury for their determination, as showing negligence on the part of the defendant. The unauthorized act of allowing the cars to stand on the tracks in one of the thoroughfares of the city, which all persons have a right to use, and where such standing cars might be the means of exposing people to danger, can not be otherwise regarded than an act of negligence, if not as a positive nuisance."

Upon the question of contributory negligence, Mr. Chief Justice Alvey said (p. 199):

> "With respect to the question of contributory negligence of the plaintiff, that was also properly submitted to the jury. As matter of defence it was incumbent upon the defendant to establish such contributory negligence, *unless shown in the proof produced by the plaintiff.* The plaintiff, at the time of the injury received, being a boy under twelve years of age, as shown by the proof, could not be expected to exercise the same degree of

> care and caution to avoid danger to himself as would be exacted of an older or an adult person, under like circumstances. The question in all such cases is whether the child has exercised such care as was reasonably to be expected from a person of his age and capacity; and *the mere fact that he was old enough to know* the probable consequences of the act which caused his injury will not conclusively determine that he was negligent in a degree to defeat his right to recover, since it is not to be expected that a child will exercise the measure of prudence or caution in avoiding danger that we expect of an adult. (Citing authorities.) Of course, if a child gets into a place of danger and is injured without the fault or culpable negligence of the defendant, there can be no ground of action. But, *on the evidence in this case,* the court could not declare, as matter of law, that there was contributory negligence, and therefore there was no right to recover. The evidence presented a case to be passed upon by the jury, though there were grounds for a diversity of conclusions from that evidence."

The learned justice then proceeded to consider the prayers which were granted at the request of the plaintiff and of the defendant, respectively.

A consideration of the terms of the first special instruction granted upon the request of the plaintiff will show that the language of Chief Justice Alvey had relation to the special facts of the case that he was considering. The controlling fact in the case then under consideration was the occupation of the railroad tracks by freight cars which obstructed the view of the plaintiff. The case had to be left to the jury, because it was a question for them to decide, as to the extent that the boy's vision was obscured hy the standing freight cars; and it is the existence of this fact which made it necessary for the jury to pass upon the question.

Inasmuch as counsel for the appellant quoted from the brief which the senior counsel for the appellee, who was also counsel in the Webster case, used on the hearing of that case in this court, it may be well to quote in full just exactly what was said:

> "But, as has been shown, there was abundant evidence that the tracks were on that occasion occupied between Eighth and Ninth and Ninth and Tenth streets by stationary cars, etc.
>
> "Consequently the only question remaining is whether or not the plaintiff was guilty of contributory negligence in the premises.
>
> "Whatever may be the law elsewhere concerning the contributory negligence of infants, it is well settled in this jurisdiction by the decisions of the Supreme Court of the United States in the cases of Railroad Company *vs.* Gladmon, 15 Wallace, 401; Railroad Company *vs.* Stout, 17 Wallace, 657:
>
> "'The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case.'
>
> "Equally well settled is it that the question of contributory negligence must be submitted to the jury, as was done in this case in the charge of the court (Rec., p. 36), *unless in the particular case the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.* Dunlap *vs.* Northeastern Railroad Co., 130 U. S., 649; Kane *vs.* Northern Central Railway, 128 U. S., 91; Jones *vs.* Railway Co., 128 U. S., 443.
>
> "There would seem to be very little room for controversy with respect to the law governing the case at bar. Counsel submit that really only two questions are involved, to wit: Had the defendant the right to obstruct these side tracks with freight cars in the manner described in the evidence? No one will claim it had such right.
>
> "Was the plaintiff, *as a matter of law, upon any view of the facts which can properly be taken,*

guilty of contributory negligence under all of the circumstances of this case? Counsel for the defendant will hardly so contend.

"The plaintiff's story of the way in which his injury was received is very simple and credible. It is summarized at page 9 of the record. No cross-examination of the able and persistent counsel for the defendant could or did shake it. If the situation was as the testimony of the defendant, as well as that of the plaintiff, tends to establish, then this boy's story fits exactly that situation. The whole case reduces itself to these few propositions. The public streets of this city are primarily for the use of its citizens.

"If railroad companies are permitted to use them, such use is a great privilege and must be availed of by the companies with due regard to the rights of citizens.

"It is not such due regard to so occupy these streets as either permanently to obstruct them or to render passage across them more dangerous than it would otherwise be.

"A citizen desiring to cross said streets is not obliged to refrain from doing so in consequence of such obstruction; he is at liberty to cross, using such care as a reasonable person would use under all the circumstances of the particular case.

"If a citizen using proper care in so crossing is injured by an approaching train which he might have seen but for the interposition of such obstructions, the railroad company is responsible for the injury occasioned by the existence of such obstruction.

"For these reasons the judgment of the trial court should be affirmed."

While counsel for the appellant refer to the decision of this court in the case of Adams *vs.* The Washington and Georgetown Railroad Company, 9th Appeals D. C., page 26, which was only upon the general question as to when a verdict should be directed by the trial court, we have no criticism to make upon the language of the

court in that case, and it is unnecessary to consider it.

While the case of the Baltimore and Ohio Railroad Company against Cumberland, *supra*, and also the case of McDermott against Severe, *supra*, both originated in the District of Columbia, and were both heard in the Court of Appeals, being reported, respectively, in 12th Appeals D. C., 598, and 25th Appeals D. C., 276, there is nothing said by this court in either of those cases which requires consideration as distinct from what the Supreme Court of the United States ultimately determined in them.

It is thus apparent that there is nothing in any of the foregoing cases which decides that an infant may not be guilty of contributory negligence as a matter of law. In this connection we refer the court to the cases quoted under caption VII of the main brief, and especially those quoted from pages 159 to 192 of said brief. We especially call attention to the language of Circuit Judge Hughes, quoted in full at pages 160 and 161. It will be recollected that in these cases the learned justice considers the language of the Supreme Court of the United States in the Gladmon and Stout cases, and affirms that this language is identical in effect with that of the supreme judicial court of Massachusetts in the case of Lynch *vs.* Smith (104 Mass., 52), where the court say:

> "If the child has not acted as reasonable care adapted to the circumstances of the case would dictate, and the parent has also negligently suffered him to be there, both these facts concurring contribute to the injury for which the defendant ought not to be required to make compensation."

In the case of Railway Co. *vs.* Flanagan (57 N. J. Law, 696), the Supreme Court of New Jersey say upon this question (pp. 698–699):

> "It is urged on behalf of the plaintiff that this rule only applies when the person injured is *sui*

> *juris;* that the plaintiff, although 9 years old, was backward both mentally and physically, compared with other boys of his age, and that it was for the jury to say whether he was of sufficient intelligence to be chargeable with negligence in crossing the street as he did. We do not think that there is anything in the evidence to warrant the idea that this plaintiff had not sufficient mental capacity to know the danger of attempting to cross a street directly in front of a moving horse-car, and to avoid such danger. A boy of his age, even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger; and when the evidence shows that he has been the heedless instrument of his own injury, he can not recover. If it were necessary for us to decide this point in order to dispose of this case, we should be inclined to hold that the plaintiff was guilty of contributory negligence in acting as he did."

The Court of Appeals of New Jersey, in the case of Sheets *vs.* Conolly Street Railway Company (54 New Jersey Law Reports, 518), said (p. 520), in the case of an infant:

> "Although the question of contributory negligence may properly be submitted to a jury, a verdict ignoring the plain inference from the facts is one proceeding from prejudice or passion, and not one that ought to be permitted to stand."

We trust that the court will carefully consider all of the cases cited under Point VII of the main brief; and we think that the court will be satisfied that if this question had been submitted to the jury in the case at bar, and they had found a verdict in favor of the plaintiff, the verdict must have been set aside, because the plaintiff's own story shows that he was *sui juris*, and guilty

of contributory negligence. But upon reason and authority, in such a case as the one at bar the question of contributory negligence is one of law, there being no disputed fact in the case in this connection.

VII.

The test as to whether or not an infant is *sui juris* is admirably given in the language of Chief Justice McSherry, quoted at page 151 of the main brief. This language is so conclusive that we reproduce it here:

> *"The age of the employee is an element to be considered in determining whether there has been actionable negligence, solely because it may furnish the basis of an inference that he lacked the capacity or judgment to comprehend the dangers of the situation in which he was placed by the direction of the master. If such an inference be a legitimate one from the evidence, then negligence would be imputed to the master because the duty of the latter is imperative not to expose a servant of immature years to a danger which he is by reason of his youth incapable of appreciating. But it is obvious that the inference can never be properly deduced and therefore can not be drawn by a jury in the teeth of uncontroverted evidence showing that the employee, though of immature years, thoroughly understood and actually knew the perils of the employment. If he knew and appreciated the perils of the employment, the condition of his being placed in a situation, the dangers of which he was, by reason of his youth, inferentially incapable of discovering, does not exist. . . . In the face of his knowledge of the dangers that were incident to the use of the saw, we can not say that the mere fact that he was but 14 years of age furnished any evidence from which a jury ought to have been permitted to deduce the inference that the master had violated some duty which he owed to the servant and*

> *had therefore been guilty of negligence.* There was no duty owed that was disregarded and consequently the trial court did right in withholding the case from the jury."

The court is asked to consider, in this connection, the cases quoted under Point VI of the main brief, beginning at p. 117, and continuing to p. 153. The test pointed out by all of the courts, and in fact the only test that reason can imagine, is to determine, to use the language of Circuit Judge Hughes (p. 121 of the main brief), whether or not the child—

> "was capable of intelligent choice between what was wrong and dangerous on one hand and what was right and safe on the other; and that he intelligently chose the wrong and dangerous course. If this be so, the law is plain."

The same learned Judge says (p. 122 of the main brief):

> "Irrespectively, however, of the law of contributory negligence as applicable to children competent to know when they are incurring danger, there can be no recovery here."

In the case of Merryman *vs.* The Chicago, &c., Railway Co. (85 Iowa, p. 634), quoted at p. 125 of the main brief, the court say (p. 637):

> "It thus appears that he knew the danger and comprehended the result of permitting his leg to be caught as it was, and that slight care on his part, which he was fully capable of exercising, would have avoided it. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their and age and capacity."

After quoting the Gladmon case and others, the same court proceeds to say:

> "There are numerous cases which hold that the question of negligence on the part of minors is for

> the jury to determine; and such is the rule where the ability of the minor to comprehend the result of his acts and the danger to which they will expose him is controverted; but this case involves no question of that kind. A little attention to his surroundings would have shown the plaintiff his danger. He fully understood what would happen to his leg if caught between the table and the embankment, and some care on his part would have been sufficient to avoid all danger."

In the case of Twist *vs.* The Winona, &c., Railroad, 39 Minn., p. 164 (pp., 126–127 of the main brief), the court say (p. 170):

> "No one voluntarily and unnecessarily enters a danger which he knows to exist without expecting to escape it. In all cases of conscious self-exposure, there is a failure to realize the extent or degree of the risk; but the act is none the less contributory negligence if the party fails to exercise ordinary care. In the present case, while the boy did not realize the extent of the danger as fully as would an adult, yet he knew that he had no right to go upon the turntable, that his father had warned him that it was dangerous, and he himself knew that it was dangerous. Yet he goes, a conscious trespasser, and does a forbidden and dangerous act. While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on the part of an intelligent boy of nearly ten and a half years amounts to contributory negligence and can not be excused on the plea of childish instincts."

VIII.

There can be no question that the evidence entirely fails to show any negligence on the part of the motorman unless the mere presence of the boy on the country road imposed some duty upon the motorman to anticipate that he would run on the track in front of the car.

We submit that such a doctrine as this is unreasonable, and is unsupported by any well-considered authority. In this connection we especially ask the attention of the court to all of the cases cited under Points II, III, IV, V, VI, VII, and X of the main brief.

The case of Felton *vs.* Aubrey (74 F. R., 350), decided by Circuit Judge Lurton, in the Circuit Court of Appeals for the Sixth Circuit, and quoted in full at pp. 208-211 of the main brief, is especially important; and the court is asked to consider it carefully. So, also, the case of Adams *vs.* Nassau Electric Railway Co. (58 N. Y. S., 543), quoted in full at pp. 216-217 of the main brief.

The case of Citizens' Street Railway Co., of Fort Wayne *vs.* Carey (56 Ind., 396, quoted at pp. 227–229 of the main brief), is especially in point. The court say (p. 404):

> "It was not negligence, under the circumstances stated, for the driver to fail, if he did fail, to see the child at the moment she started to advance. We do not think a case of negligence on the part of the appellants by the acts of their servant, the driver, is made out. The appellant owed a duty to its patrons, being the traveling public, and to those persons who might happen to be upon or crossing the railroad track, which duty the driver Keanly was to discharge. The duty to the traveling public was to make regular trips, and on time, whenever it could reasonably be done. This necessarily forbade that he should stop his car or slacken its speed, except when there was a necessity for it. The running of the street-cars, as we have said, conformably to the regulations, was a service useful to the public and required by implied contract. In our opinion, the facts in this case do not show that a necessity appeared for stopping or slacking the speed of the car till the plaintiff attempted to cross the track; that when that necessity did appear, the driver made what effort he could to avert the catastrophe that happened, but that the effort was unavailing because

the necessity was created by the act of the plaintiff when it was too late to avert the unhappy consequences of that act.

"In this case the plaintiff placed herself beside the railroad track, at a distance from it, where she was out of harm's way. The passage of a horse-car at its ordinary rate of speed was not calculated to frighten and confuse her. She stood still beside the track. There she had stood from the moment the driver first saw her, and continued to stand till it may be said she, in effect, threw herself under his horse's feet. Nothing indicated to him that she intended to cross the track, but, on the contrary, that she was standing there for the purpose, as was the habit of children of the city, to witness the passage of the car. The facts would justify the driver in drawing this conclusion. Everything indicated to him that there was no necessity for stopping the car or slacking its speed. We do not think it is the duty of a street-car driver to stop his car, or to constantly creep along at a snail's pace, for fear or in anticipation that some child may possibly throw itself under his horse, in the absence of anything indicating the probable occurrence of such an act.

"Suppose he had stopped the car when he first saw the plaintiff; what was he to do? He might then have brought his horse to a walk; was he required by the circumstances to do so, to avoid the charge of negligence? *If he was in this case, then he would be bound to do so in every case where he saw children standing beside the track;* and the consequence might be that this would result in such slow traveling upon the cars as to cause their abandonment by the traveling public, and bring ruin to the street railroad company. It seems to us that he was not bound to slacken his speed, it then being but ordinary, till there was a necessity for it. What necessity for it appeared in this case? The plaintiff was standing beside the track, where she was out of danger, and where it was common for children to stand as the cars passed. She evinced no disposition to enter upon

> the track or to approach to a dangerous proximity to it.
>
> "The presumption was that she would not. In such a case it seems to us clear, that it was not negligence in the driver to continue his usual rate of speed, *till the plaintiff did commence to move upon the track. Nor do we think it was the duty of the driver, considering the diversity of objects demanding his attention, to keep his eyes continuously on the plaintiff;* and, hence, as we have already said, it was not negligence in him to fail to see her, if he did so fail, at the moment she commenced to move upon the track. This decision is supported by Young *vs.* Harvey, 16 Ind., 314, and cases cited."

Rudd *vs.* R. & D. R. R. Co. (80 Va., 546), was a case in which a boy of 12 was held guilty of contributory negligence, defeating a recovery for his death.

Equally strong and reasonable language is used by the Supreme Court of Louisiana in the case of Miller et al. *vs.* St. Charles Street Railway Co. (114 La., 409, quoted at pp. 222–225 of the main brief).

To interpret literally the language of Justice Redfield in the case of Robinson *vs.* Cone (22 Vt., 213), to the effect that "if one knew that such a person" (a child 11 years old) "is in the highway, . . . he is bound to a proportionate degree of watchfulness," would be to do an unreasonable thing. As has been well said in the case of Cords *vs.* Third Avenue R. R. Co. (4 N. Y. S., 439, quoted at page 217 of the main brief):

> "There was no presumption of negligence. Until the contrary is shown, it is to be assumed that the driver did his duty in looking ahead over his pathway, and would have avoided whatever it was his duty to avoid. To show that he neglected this duty it was necessary to show that the child was in the way, and that it was the duty of the driver of the car to see him."

This is only one of numerous cases where courts have affirmed—what everyone knows without that affirmation—that it is the duty of the motorman to see that the track in front of him is clear. To hold that the mere presence of a child on the sidewalk or in the roadway calls upon him to slacken the speed of his car or to concentrate his attention in watching that particular child instead of looking on the track ahead of him is to impose upon him a liability which neither reason nor authority does. He is put on the front platform of the car to run the car at a lawful rate of speed, to accommodate the traveling public. To hold as a matter of law that the presence of a child on the sidewalk or in the street imposes upon him an obligation to abandon or give less careful attention to his other duties, and to concentrate his attention on that child in an apprehension that from some childish impulse it may suddenly run in front of or against his car, is to do an unreasonable thing. It is only when the child is in front of the car, so near that unless the car stops it will strike him, that he is obliged to stop the car.

The only reason why, in the Severe case, the Supreme Court of the United States held that the question of the motorman's negligence was one for the jury, was because the situation of the boy immediately in front of the car, accompanied by the gestures and shouts of the boy himself and of his brother on the bank, were facts from which the jury might well argue that the motorman ought to have known that an extraordinary situation existed, and therefore should have brought his car to a stop in order to avoid a danger that was apparent.

IX.

Counsel strongly insist that upon the boy's undisputed evidence the accident in question was caused by

his stumbling and falling—something that the motorman had no reason to anticipate. In this connection they again call the attention of the court to the cases cited in the main brief under Point IX, pp. 201–206, and especially to the Maryland case quoted at pp. 202–203 of the main brief, and the Georgia case quoted at pp. 203–204 of that brief.

X.

Some doubt was expressed by the court during the argument as to whether or not a corporation would be responsible for the unauthorized act of its servant beyond the scope of his employment. The question was asked whether or not the Supreme Court of the United States has passed upon the question. The Supreme Court has so passed in a number of cases. These decisions cover too wide a field to be here cited in detail. It will be sufficient to call attention to the case of Washington Gas Light Co. *vs.* Lansden (172 U. S., 534). The syllabus of the case is to the effect that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. This was a case in which a corporation, the Washington Gas Light Company, was sought to be held liable for the act of one of its officers in libeling the plaintiff below, Lansden. The court say (p. 545):

> "We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between

> Brown and himself. There is no evidence of an express authority, nor of any subsequent ratification of Leetch's conduct by the company. Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment."

In the case of Fletcher *vs.* The Baltimore and Potomac Railroad Company (6 App. D. C., 385), this court decided that where one of a number of railroad employees returning home from work on a repair train upon which was a quantity of refuse timber gathered by them during the day to be thrown off as they passed near their homes, as had been the practise for several years, threw a piece of the timber from the train and thereby accidentally injured a person standing on an adjacent sidewalk, the employee was acting beyond the scope of his employment, and the railroad company was not chargeable with his negligence. The Supreme Court of the United States reviewed the decision of this court in this case in 168 U. S., p. 135. The Supreme Court reversed the judgment of this court, but solely upon the following ground:

It appeared from the testimony that—

> "it was and for a long time had been the custom of the railroad company to allow its workmen, who went out on the repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing their pieces off the train while in motion, at the points nearest their own homes, being cautioned on the part of the company not to injure any one in doing it."

The court further held—

> "that it was for the jury to say whether the custom on the part of the workmen was known to the company, whether, if known, it was acquiesced in, whether it was a dangerous custom from which injury should have been apprehended, and whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act."

It is thus seen that this reversal by the Supreme Court does not at all affect the general doctrine that a corporation is liable for the acts of its servants only when such acts are within the scope of the employment and duties of such servants.

Upon this point counsel refer to the cases cited in their main brief (pp. 192–201) under Point VIII. Especially counsel ask the attention of the court to the case of Forster-Herbert Cut Stone Co. *vs.* Pugh., 4 L. R. A. (N. S.), 805, and to the case note thereto appended.

XI.

The briefs which the appellee has filed in this cause are so voluminous that its counsel are unwilling to swell their bulk. To review singly each one of the cases cited in general terms upon the brief for the appellants would consume much time and cover much space. Counsel for the appellee will content themselves by calling attention first to the fact that most of their authorities are quoted in such general terms that it is impossible to gather from the brief the effect of the language quoted. As, however, counsel for the appellant especially rely upon the case of Felton *vs.* Aubrey, cited by them at pages 25–27 of their brief, and inasmuch as this case is especially relied upon by counsel for the appellee and is quoted at length at pages 208–211 of their brief, it would

seem that a few moments' attention might be given to it here.

Counsel for the appellee earnestly insist that this authority is one of the strongest in support of their contention. In that case the boy who was injured insisted that he was overtaken as he was crossing the track in front of the train. The railroad company insisted that he was walking along the side of the track, and from that position undertook to grab and climb upon the moving train. Here, of course, were two antagonistic statements, and the jury under ordinary circumstances would have to decide which was the true one. In the case at bar, however, there is only one state of facts to be considered for the purposes of this part of the discussion, and that is whether or not, conceding the boy's statement to be true, there is any evidence of negligence on the part of the defendant.

Judge Lurton, in delivering the unanimous opinion of the court, says (74 F. R., p. 353), after considering the consequences of the boy's statement that he was in front of the train, the following:

> "But if, on the other hand, the defendant in error (the injured boy) was not on the track, nor near enough to be struck by a passing train, nor in a position in which he appeared to be in danger, or about to get into danger, and from the side of the track undertook to grab and climb upon a moving train, his immaturity of years and discretion would have no bearing whatever. In such case the railway company would be guilty of no negligence, and the injury sustained by the defendant in error would not be the result of any fault or breach of duty by the railway company. If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous."

The plain interpretation of this language is that if the boy in question was not on the track, but was on the

side of the track, and was near enough to the moving train to undertake, from the side of the track, to grab at it and climb upon it, then he was not in danger, because he was not near enough to be struck by a passing train, and was not in a position in which he appeared to be in danger or about to get into danger. Now, in the case at bar the boy does not pretend that he was near enough to the moving car to be struck by it; nor does he pretend that if he had stopped running he would have been in any danger of being struck by it. He was hurt, he says, because he stumbled, and his foot flew out under the car.

Counsel submit that there could not be a stronger authority in their favor, or one more directly in point, than this very case of Felton *vs.* Aubrey.

Again, the appellant has quoted at page 37 of his brief the case of the City Passenger Railway Co. *vs.* Cooney (87 Md., 261). The case, quoted at page 202 of the brief for the appellee, is, it is insisted, exceedingly strong for the appellee, and is directly against the appellant. The Court of Appeals of Maryland says distinctly (pp. 269–270):

> "If, in point of fact, the plaintiff when standing in the street 'was at the side of the track and not in the way of the car,' the motorman could not be required to have anticipated that the plaintiff would stumble and thereby get on the track."

Again the court says (p. 270):

> "But if, in point of fact, the plaintiff was not on the track and not in the way of the car, there was no reason so far as he was concerned to sound the gong. If he intentionally got on the track just as the car reached that point, without first looking to see if a car was coming, he was guilty of contributory negligence, and if he got on by stumbling and falling on the track too late for the motorman to see him, or to prevent running over him, the defendant is not liable."

Now, it is not pretended in the case at bar that after the plaintiff stumbled and fell it was within the power of the motorman to do any act whatever to prevent the accident. In order to find the defendant guilty of negligence, the court must find as matter of law that as soon as the boy began to run toward the moving train the motorman's duty was to concentrate his attention upon him, and to stop the car when the boy reached some indefinite point from the car, and before he could run into it. It must be remembered that it was impossible for the boy to run ahead of the car. If the motorman had stopped the car, the boy might nevertheless have run into it and have been hurt. Whatever view is taken of the case no negligence can be imputed to the motorman unless a duty is imputed to him with respect to children which the law nowhere imputes, and which would be destructive of the rights of the defendant as a quasi-public servant and of the traveling public.

At pages 28–33 of the appellant's brief certain cases are quoted which have no application whatever to any question under discussion here. The case of Buck *vs.* People's Railway Co. (108 Mo., 179), was one in which the driver of a passenger street-car invited the infant plaintiff to get on the car. So, also, was the case of Danbeck *vs.* New Jersey Co. (57 N. J. Law, 463). There is reason and authority for saying that a street-car company is bound by the act of the conductor or person in control of a passenger car in inviting a child to get on board the car as a passenger; but these cases have no possible application to a person who is not a passenger.

In the case of Levin *vs.* Second Avenue Traction Co. (194 Penn. State, 156), a boy 5 years old was on the lower step of the front platform of an electric car. The motorman did not see him there until the car had started; and then he knocked on the window of the front platform, which was enclosed, and kicked on the lower

part of the closed side of the door, to attract the boy's attention. Thereupon the child jumped off and fell, and his foot was run over, necessitating amputation. This case was decided upon the ground that the moment a child 5 years old was seen standing on the lower step of the front platform of an electric car in motion, the platform being enclosed, it was the duty of the motorman to stop the car, for the obvious reason that any jerk of the car would probably have thrown the child off.

The case of Robinson *vs.* Cone (22 Vt., 213) is the one in which Judge Redfield used the language with respect to a child 4 years old, that—

> "if one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."

The case concerned a small boy, as has been said, about 4 years of age, who was coasting on a country road, and whose leg was run over by an adult driving a sleigh along the same road. It appears from the statement of the case (pp. 214–217) that the driver of the sleigh had abundant room to pass the boy without running over him. The court held that the circumstances of the case required a submission to the jury. The general language of Judge Redfield can only be justified, if at all, by the peculiar circumstances of the particular case.

The case of Wallace, Admr., *vs.* City & Suburban Railroad Co. (25 L. R. A., 664), was the case of a child attempting to cross a street-car track in front of a car, the child being actually on the track.

In the case of Roth *vs.* Union Depot Co. (13 Wash., 525), the plaintiff, a boy of 9 years of age, while going along the track of a railroad company, was knocked down

by a car. It further appeared that the car which did the damage was a car unattended by a brakeman. There were other circumstances very much as in the Webster case which rendered it proper that the case should go to a jury.

In the case of Danbeck *vs.* The New Jersey Traction Co. (57 N. J. Law, p. 463), which is cited by counsel for the appellant as establishing the doctrine that a street-car is dangerous machinery, the facts were that a boy 10 years old entered a car upon the invitation of its conductor, and was thrown from the front platform by the carelessness of the driver. While there is some general language of Chief Justice Beasley referring to a street-car as a dangerous machine, yet the connection in which this language is used explains it. The learned justice says (p. 466):

> "The defendant has introduced and is in the habit of using, in the public streets of a city, a machine of a highly dangerous character, and as children have the right to frequent such streets, it is the duty of the company to provide in all reasonable ways for their safety, so far as the same is imperiled by the business it thus transacts. It can not be reasonably contended that if the master be liable for the carelessness of his servant for leaving a dangerous machine in a street, where it is likely to be meddled with by children, he will not be liable if his servant permits children to meddle with such machine. In such transactions, the knowledge of the servant of the situation aggravates his negligence. It is the plain duty of these street railroad companies to prevent children, except under proper safeguards, from entering their cars, and if this duty be neglected they become responsible for the consequences."

The learned chief justice then goes on to hold that wherever a small child is allowed to enter a passenger

car by the person in charge thereof, the child becomes thereby entitled to the care of a passenger.

The case of Gray *vs.* St. Paul Railway Co. (87 Minn., 280; appellant's brief, p. 21) was one in which a small child was struck at a crowded street crossing in the midst of a city. The court says:

> "As the children approached the tracks the motorman of the car coming down the Oakland avenue grade could have seen the children, and should have anticipated that they would either attempt to cross the tracks ahead of the car, or that they would be in such close proximity as to be in danger, and that under such circumstances it was the duty of the motorman to have had his car under control, and checked its speed. That the car came down the hill at a rapid rate and crossed Garfield street without giving any signal, and, in consequence, the boy was struck."

The court say (p. 283):

> "In view of this testimony, we think it was a question of fact for the jury to pass upon, whether or not, under the circumstances, the persons in charge of the car were in the exercise of such care as should be exercised at a crossing of that character under such circumstances. If it was true that the train came down the grade at a rapid rate and crossed Garfield avenue without giving any signals or slowing up, and the motorman did not look to see whether any persons were approaching the crossing at that point, then we think the jury were justified in holding the defendant guilty of negligence. In the decision of this case we assume that there was no contributory negligence on the part of deceased, or the little girl in charge of him, or of the parents. The boy was non sui juris, and that question is eliminated by concessions of defendant. It can make no difference that the front part of the car had passed the children, and that the boy came in

> contact with the second part or rear of the train, for the evidence tended to show that they were either standing in close proximity to the cars at the time the motorman passed them, or that they were approaching them with the intent of crossing the track, either upon a walk or running. It was for the jury to say whether it was reasonably to be apprehended that such young children might run into or come in collision with the car as it was passing."

The whole force of this decision depends upon the fact that the car was coming down-grade at a city crossing. Two little children were approaching the track, with the intention, so far as the motorman could ascertain, of crossing over in front of the car. He did not slow up or give any signal, but kept on, and one of the children was struck by the side of the car and injured. In the case at bar, on the plaintiff's own showing, he had no intention of crossing the track or of getting in front of the car; in fact he could not have gotten in front of it; and the motorman had no reason to assume that he would do otherwise than stop when he got near enough to the car to be injured thereby. When he fell it was too late for the motorman to take any action whatever for his safety. Just before he fell he was not in danger.

In the case of Wilton *vs.* Middlesex Railway Co. (107 Mass., 108; S. C., 125 Mass., 130), the injured child was riding on the car at the invitation of the driver, and was thus entitled to the protection of a passenger. (These cases cited at pp. 32–33 of brief for the appellee.)

A more extended discussion of the cases cited by the counsel for the appellant is impracticable, and, it is submitted, unnecessary. The foregoing cases show in how small a degree their contentions are supported by the authorities which they have cited.

XII.

Inasmuch as the language of Mr. Justice Brewer, delivering the unanimous opinion of the Supreme Court of the United States, in the case of Patton against Texas and Pacific Railroad Company, 179 U. S., page 658, was not quoted in the main brief of counsel for the appellee, they now reproduce that language as follows (p. 660):

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. Richmond & Danville Railroad *vs.* Powers, 149 U. S., 43.
>
> "Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

Respectfully submitted.

R. ROSS PERRY.
R. ROSS PERRY, JR.
G. THOMAS DUNLOP.

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1906.

No. 1684.

FRANCIS D. BARSTOW, APPELLANT,

vs.

THE CAPITAL TRACTION COMPANY, A CORPORATION

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 12, 1906.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 25, 1906.

In the Court of Appeals of the District of Columbia.

No. 1684.

FRANCIS D. BARSTOW, Appellant,
vs.
THE CAPITAL TRACTION COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 45091.

FRANCIS D. BARSTOW
vs.
THE CAPITAL TRACTION COMPANY, a Corporation.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed December 13, 1901.

In the Supreme Court of the District of Columbia.

At Law. No. 45091.

FRANCIS B. BARSTOW
vs.
THE CAPITAL TRACTION COMPANY, a Corporation.

The plaintiff, Francis B. Barstow, sues the Capital Traction Company, of the City of Washington, District of Columbia, for that heretofore, to wit, at the time of the committing of the grievances hereinafter complained of, the defendant was a corporation duly incorporated by an Act of Congress of the United States and having its habitat in the said City of Washington, and was engaged in the business of a common carrier of passengers for hire through, over and upon certain streets and highways of said City and District by means of cars propelled by electricity on a certain street railroad owned by said defendant corporation, one of said streets

and highways so used by said defendant corporation, being then and there known as Connecticut Avenue extended; and for that, heretofore, to wit, on or about the 15th day of December, A. D. 1900, at or about the hour of Four o'clock in the afternoon, Paul D. Barstow, an infant son of the plaintiff, then and there being a child of about the age of Nine, (9) years, in attempting to
2 comply with the request of, and in response to the call and invitation of, one of the agents or servants of said defendant corporation, to approach a car belonging to said defendant corporation, then and there in motion on the railroad aforesaid of said defendant corporation, on said Connecticut Avenue extended between Albemarle street and the Military, or Grant Road in said District, said car being then and there in charge and under control of the agents and servants aforesaid of said defendant corporation, and being used to carry freight upon the street railroad aforesaid, and while using such care as was reasonably to be expected of a child of his age, disposition and surroundings, was thrown to the ground and violently struck by the freight car aforesaid then and there owned, propelled and operated as aforesaid by said defendant corporation, and was permanently injured and his left foot crushed, bruised and wounded, so that the same had to be amputated at a point above the ankle joint, and the said infant, Paul D. Barstow, was then and there otherwise injured, bruised and made sick, sore, lame and disabled, and did then and there suffer great pain and distress, and has been rendered incapable forever of attending to any business or occupation as he would otherwise have been able to do, and then and there other great wrongs and injuries to the said infant, Paul D. Barstow, did commit; and the plaintiff in fact says, that said wrongs and injuries were done, caused and occasioned by the negligence and want of due and reasonable care on the part of said defendant corporation, its servants and agents, in carelessly
3 and recklessly requesting, calling and inviting the said infant, Paul D. Barstow, to approach said car while the same was in motion, and imprudently, improperly and unlawfully putting said infant, Paul D. Barstow, in danger, and in the failure and neglect of said defendant corporation, its agents or servants, to stop said freight car after requesting, calling and inviting said infant, Paul D. Barstow to approach the same, and in the failure and neglect of said defendant corporation, its servants and agents, while running said car, to keep a reasonable, careful and proper lookout, and in the failure of said defendant corporation, its agents and servants, to give warning, signal, or notice, to said infant, Paul D. Barstow, of the danger in approaching the freight car aforesaid when in motion, at the time and place aforesaid, all of which acts and omissions arose from the negligence and want of ordinary and proper care on the part of the said defendant corporation, its servants and agents, and were, are and will be to the great wrong and injury of the said infant, Paul D. Barstow; by reason whereof, the plaintiff herein was then and there obliged to pay, lay out and expend, and did necessarily pay, lay out and expend divers sums of money to secure and employ the care and medical skill of physi-

cians, nurses and servants and to provide medicines and appliances in endeavoring to heal the said Paul D. Barstow, his son, of the sickness, soreness, lameness and disability aforesaid, occasioned by and ensuing in consequence of the carelessness and negli-
4 gence of the said defendant corporation, as aforesaid, and which has continued from thence hitherto; and whereby also, he, the said plaintiff, has been and will be deprived of the benefit and assistance of the services of said Paul D. Barstow during his minority, which the plaintiff might and otherwise would have had, and which said Paul D. Barstow has been rendered incapable forever of performing as he would otherwise have been able to do, in consequence of the carelessness and negligence of the said defendant corporation, as aforesaid; and other wrongs and injuries to the said plaintiff then and there did, to the damage of said plaintiff in the sum of Five thousand dollars ($5000.00) and therefore he brings this suit, and claims damages in the sum of Five thousand dollars ($5000.00) besides costs.

H. T. TAGGART,
E. D. F. BRADY,
Attorneys for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the Twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereto; otherwise judgment.

H. T. TAGGART,
E. D. F. BRADY,
Attorneys for Plaintiff.

5 *Plea of Defendant.*

Filed January 6, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45091.

FRANCIS B. BARSTOW
vs.
THE CAPITAL TRACTION COMPANY.

The Capital Traction Company, the defendant in the above entitled cause, for a plea to the declaration of the plaintiff filed therein, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY,
Attorney for Defendant.

Joinder In Issue.

Filed January 13, 1902.

In the Supreme Court of the District of Columbia.

At Law. No. 45091.

FRANCIS B. BARSTOW
vs.
THE CAPITAL TRACTION COMPANY.

6 The plaintiff joins issue upon the defendant's plea.

H. T. TAGGART,
E. D. F. BRADY,
Att'ys for Plaintiff.

Memoranda.

March 14, 1906.—Jury sworn and respited.
March 15, 1906.—Leave to plaintiff to amend declaration. Motion of defendant for continuance overruled. Jury again respited.

7 *Amended Declaration.*

Filed March 19, 1906.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

At Law. No. 45091.

FRANCIS D. BARSTOW, Plaintiff,
vs.
THE CAPITAL TRACTION COMPANY, a Corporation, Defendant.

Francis D. Barstow, sues the Capital Traction Company, of the city of Washington, District of Columbia, for that heretofore, to wit; at the time of the committing of the grievances hereinafter complained of, the defendant was a corporation duly incorporated by an Act of Congress of the United States and having its habitat in the said city of Washington, and was engaged in the business of a common carrier of passengers for hire through, over and upon certain streets and highways of said city and District by means of cars propelled by electricity on a certain street railroad owned by said defendant corporation, one of said streets and highways so used by said defendant corporation, being then and there known as Connecticut Avenue extended; and for that, heretofore, to wit, on or about the 15th day of December, A. D. 1900, at or about the hour of four o'clock in the afternoon, Paul D. Barstow, an infant,

son of the plaintiff, then and there being a child of about
8 the age of nine (9) years, while approaching a car belonging to said defendant corporation, in response to the call of one of the agents and servants of said corporation, said car being then and there in motion on the railroad aforesaid of said defendant corporation, on said Connecticut Avenue extended between Albemarle Street and the Military, or Grant Road, in said District, and being then and there in charge and under the control of the agents and servants of said defendant corporation, and being used to carry freight upon the street railway aforesaid, while said agent and servant, being the motorman operating and in charge of the operation of said car, was speaking to and looking directly at the said infant, Paul D. Barstow, and while said infant was in full view of said motorman, and using such care as was reasonably to be expected of a child of his age, disposition and surroundings, did approach said car in such proximity as to be in a position of peril and danger from said car; and the defendant, its said servant and agent, did carelessly, negligently and recklessly permit said infant, Paul D. Barstow, to so approach said moving freight car, and when said infant, Paul D. Barstow, was so near thereto as to be in peril and danger as aforesaid, which was known to the defendant, said defendant did fail and neglect to stop said freight car after having knowledge that said infant, Paul D. Barstow, was approaching close to said car while said car was in motion as aforesaid, and was in danger and peril as aforesaid, and did fail and neglect to give any warning, signal or notice to said infant, Paul D. Barstow, of the
9 danger in approaching the freight car aforesaid when in motion, at the time and place aforesaid. And the said infant, Paul D. Barstow, stumbled or slipped and so fell to the ground and was, by the aforesaid negligence of the defendant, its agents and servants, violently run over by the freight car aforesaid, then and there owned, propelled and operated as aforesaid by said defendant corporation, and was permanently injured and his left foot crushed, bruised and wounded, so that the same had to be amputated at a point above the ankle joint, and the said infant was then and there otherwise injured, bruised and made sick, sore, lame and disabled, and did then and there suffer great pain and distress, and has been rendered incapable forever of attending to any business, or occupation, as he would otherwise have been able to do, and then and there other great wrongs and injuries to the said infant, Paul D. Barstow, did commit, all of which wrongs and injuries arose from the negligence and want of ordinary and proper care on the part of the said defendant corporation, its agents and servants, and were, are and will always continue to be to the great injury of the said infant, Paul D. Barstow; by reason whereof, the plaintiff herein was then and there obliged to pay, lay out and expend, and did necessarily pay, lay out and expend divers sums of money to secure and employ care and medical and surgical skill of physicians, nurses and surgeons, and to provide medicines and appliances in endeavoring to heal the said infant, Paul D.

Barstow, his son, of the sickness, soreness, lameness, and
10 disability, aforesaid, occasioned by and ensuing in consequence of the carelessness and negligence of said defendant corporation, as aforesaid, and which has continued from thence hitherto; and whereby also, he, the said plaintiff, has been and will be deprived of the benefit and assistance of the services of the said Paul D. Barstow, his son, during his minority, which the plaintiff might and otherwise would have had, and which said infant Paul D. Barstow, has been rendered incapable forever of performing as he would otherwise have been able to do, in consequence of the carelessness and negligence of the said defendant corporation, as aforesaid; and other wrongs and injuries to the said plaintiff then and there did, to the damage of the said plaintiff in the sum of five thousand dollars; and therefore he brings this suit and claims damages in the sum of five thousand dollars ($5000) besides costs.

E. D. F. BRADY,
WILTON J. LAMBERT,
FRANK J. HOGAN,
Attorneys for Plaintiff.

(Endorsed:) File Wright.

11 *Memoranda.*

March 19, 1906.—Sealed verdict ordered.
March 20, 1906.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *March* 23, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 45091.

FRANCIS B. BARSTOW, Pl't'f,
vs.
THE CAPITAL TRACTION COMPANY, a Corporation, Def't.

Now comes the plaintiff and moves for a new trial for the following reason.

12 1. That the Court erred in directing the jury to return a verdict for the defendant.

Supreme Court of the District of Columbia.

MONDAY, *April* 2, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 45091.

FRANCIS B. BARSTOW, Pl't'f,
vs.
THE CAPITAL TRACTION COMPANY, a Corporation, Def't.

Upon consideration of the motion of the plaintiff for a new trial, the same is hereby overruled, and judgment on verdict ordered:

Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff its costs of defense, to be taxed by the Clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals.

It is hereby ordered that the January Term 1906 of the
13 Supreme Court of the District of Columbia be, and the same is hereby prolonged for the period of thirty eight (38) days, exclusive of Sundays, for the purpose of settling the bill of exceptions in the above entitled cause.

Memorandum.

April 23, 1906.—Appeal bond filed.

Stipulation of Counsel.

Filed May 8, 1906.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

At Law. No. 45091.

FRANCIS D. BARSTOW
vs.
CAPITAL TRACTION COMPANY.

This case having come on to be heard together with the case of Paul D. Barstow, by his next friend, *v.* Capital Traction Company, at Law No. 45,090, and one jury having been sworn to try the issues in both cases, and all the evidence and rulings having been the same in both cases, it is hereby stipulated and agreed, this eighth day of May, A. D. 1906, by and between the respective parties of this cause, by their counsel, that the bill of exceptions in cause No. 45,090 being identical in every respect with the bill of exceptions in cause No. 45091 shall be taken and read as if fully incorporated herein. It is further stipulated and agreed that this cause
14 shall be docketed in the Court of Appeals and shall abide the decision on appeal in the case of Paul D. Barstow, by his next friend, *v.* Capital Traction Company.

FRANK J. HOGAN,
Attorney for Plaintiff.
R. ROSS PERRY AND SON,
Attorney- for Defendant.

Designation for Transcript of Record.

Filed May 8, 1906.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

At Law. No. 45091.

FRANCIS D. BARSTOW
vs.
CAPITAL TRACTION COMPANY.

The appellant hereby designates the following papers and entries to be included in the Transcript of Record on appeal:

1. Plaintiff's declaration, filed December 13, 1901.
2. Plaintiff's amended declaration, filed March 19, 1906.
3. Plea of defendant.
4. Joinder in issue.
5. Proceedings showing jury impanelled and memorandum of dates jury respited.
6. Memorandum of leave of Court to plaintiff to amend declaration.
7. Entry showing ordering of sealed verdict March 19, 1906.
8. Verdict.
9. Memorandum of filing of motion for new trial and order overruling.
10. Judgment.
11. Memorandum of appeal noted in open court.
12. Memorandum showing term prolonged.
13. Memorandum of the filing and approving of appeal bond with date.
14. Stipulation of counsel dated eighth day of May, 1906.

FRANK J. HOGAN,
Attorney for Plaintiff.

Agreed to this 8th day of May, A. D. 1906.

R. ROSS PERRY AND SON,
Attorney- for Defendant.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 15, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45,091, at law, wherein Francis D. Barstow, is Plaintiff and The Capital Traction Company, a

Corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 8″ day of June, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1684. Francis D. Barstow, appellant, *vs.* The Capital Traction Company, a corporation. Court of Appeals, District of Columbia. Filed Jun- 12, 1906. Henry W. Hodges, clerk.